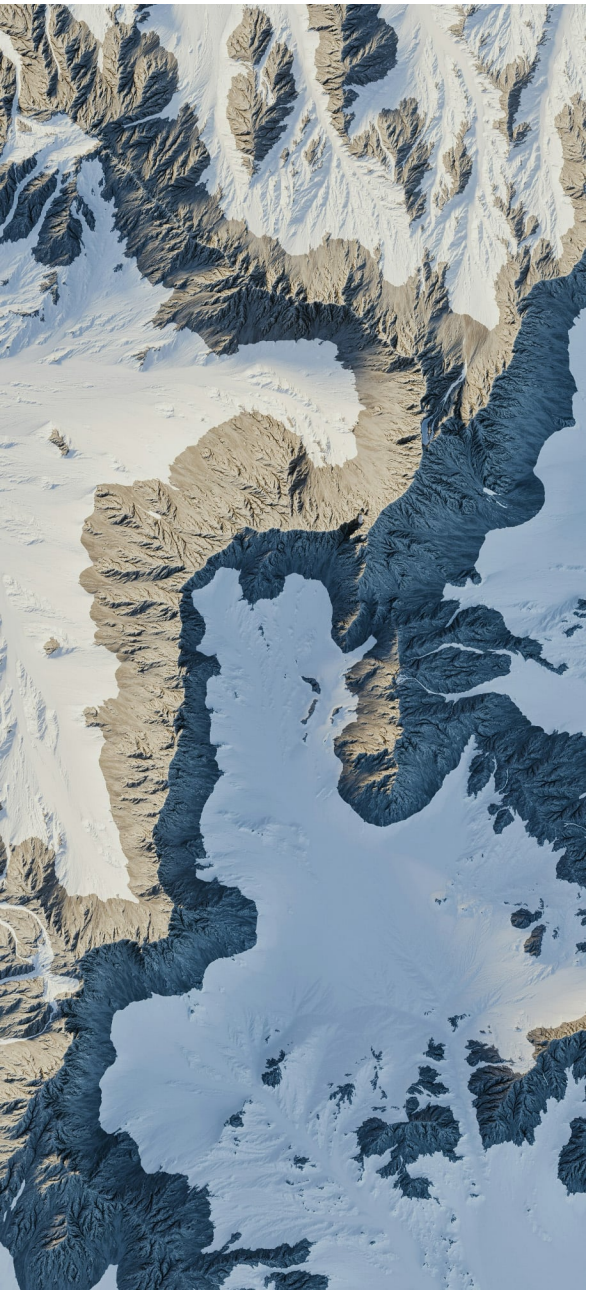


GERMANY

Global Guide to Directors' Duties

DLA PIPER

Introduction



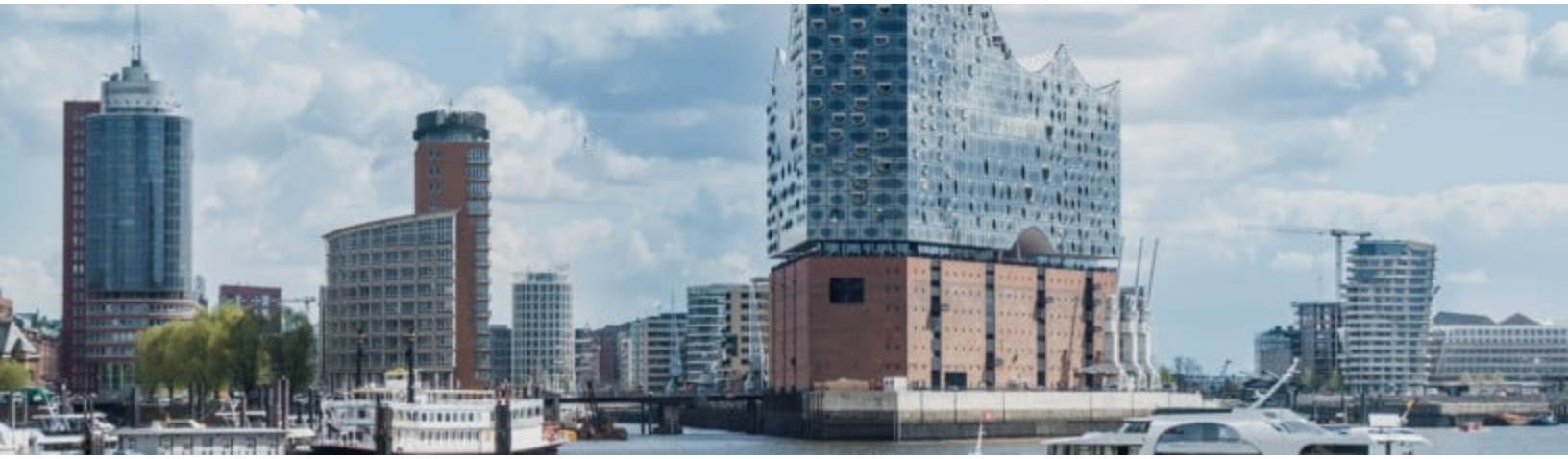
Explore directors' duties around the world

Prepared by DLA Piper's experts in the field, this guide gives you an overview of directors' duties in 52 jurisdictions around the world, answering questions about the key duties, obligations and potential liabilities faced by directors in each jurisdiction.

The guide also enables you to compare several jurisdictions easily and quickly. For further information about the topics covered in the guide, please contact us.

Germany

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Corporate entities

What type of company is typically used in group structures?

Typically, a Private Limited Liability Company (*Gesellschaft mit beschränkter Haftung* – GmbH) is used in group structures. It is by far the most common legal type.

Types of director

What is a "director"?

For a GmbH, the correct term is "managing director" (*Geschäftsführer*). A managing director must be a natural person. A managing director manages the affairs of the company and represents it towards third parties.

The general rule is that in case of more than one managing director, the managing directors represent the company jointly. However, the articles of association may stipulate or allow that a managing director has sole power of representation or that, for example, two managing directors represent the company jointly or that one managing director does so jointly with a registered proxy holder (*Prokurist*).

What are the different types of director?

There are no different types of director.

Eligibility

Who can be a director?

A managing director must be a natural person and contractually capable without any restriction, i.e. at least 18 years old.

There are no restrictions as to nationality. However, if the company only has managing directors who are not resident in Germany, this may cause tax residency issues for the GmbH as it may not be considered as tax resident in Germany. In order to qualify as a

German tax resident for double taxation purposes, the place of effective management of the GmbH needs to be in Germany. Such place of effective management is the place where the material decisions with respect to the company's day to day business are actually taken. In particular, decisions of the management should therefore be taken and recorded in Germany. In order to avoid attention from the tax authorities and potential negative tax consequences, it is thus preferable to have at least one managing director with residency in Germany.

Persons who have been convicted for certain crimes such as a delayed filing of insolvency (*Insolvenzverschleppung*), other insolvency crimes, false declarations when founding a limited liability company or fraud within the past five years are not eligible to become a managing director.

Minimum / maximum number of directors

A GmbH must have at least one managing director. There is no maximum number. The articles of association may, however, require a higher minimum number and/or specify a maximum.

Appointment and removal

How are directors appointed?

Corporate Body

The managing directors are generally appointed by a resolution of the shareholders' meeting, either by a formal meeting or by a resolution in text form (including email). The articles of association may also allow for the passing of virtual resolutions or by telephone.

If the company has a supervisory board, the appointment of managing directors may be delegated to such supervisory board in the articles of association.

Form

Before the Covid-19 pandemic, in the absence of any respective allowance in the articles of association, a shareholders' meeting could only be replaced by a resolution passed in text form if all shareholders agreed in text form either to the provision to be made or to the votes being cast in writing.

In order to ease formalities in the Covid-19 pandemic, German law stipulated from 28 March 2020 until 31 August 2022 that shareholder resolutions could be adopted in text form or by casting votes in writing even without the consent of all shareholders. Such relief expired on 31 August 2022 and has been replaced by a stipulation in the German Limited Liability Companies Act (*GmbHG*), specifically § 48(2) GmbHG that shareholder meetings can be conducted remotely if all shareholders consent to such procedure.

The regulation mentioned above by which a shareholders' meeting can be replaced by a resolution passed in text form if all shareholders agree in text form either to the provision to be made or to the votes being cast in writing, is still valid.

Declaratory registration

The appointment of a new managing director must be filed with the commercial register of the company. The registration is merely declaratory and must be signed in a notarially certified form. Both the birthdate as well as the town and country of residence need to be declared and will be publicly available.

How are directors removed?

Managing directors are removed either:

- by a shareholder resolution or
- by a resignation letter of the particular managing director which must be addressed to the shareholders' meeting/supervisory board (see above) and received by the latter.

The removal must also be filed with the commercial register and is merely declaratory.

Board / management structure

Typical management structure

Management board

Typically, a GmbH only has managing directors forming the management board. In principle, all managing directors are jointly responsible for the management of the company. It is, however, possible to delegate certain tasks/fields among themselves. Nevertheless, the managing directors who are not specifically in charge of such tasks /fields have to supervise such managing director who has been accorded with the respective responsibility. In contrast, certain fundamental duties (such as filing for insolvency if the GmbH becomes insolvent) cannot be delegated at all.

Supervisory board

It is possible to implement an optional supervisory board. If the GmbH is subject to German Co-Determination Law (*Mitbestimmung*), the implementation of a supervisory board is mandatory and the following ratios apply:

- If the GmbH has more than 500 employees, a third of the members of the supervisory board must be employee representatives.
- If the GmbH has more than 2000 employees, half of the members of the supervisory board must be employee representatives.

Advisory board

It is also possible to establish an optional advisory board. Such corporate body is particularly common in private equity contexts.

How are decisions made by directors?

Usually, either the articles of association or rules of procedure for the managing board determine the (usually quite flexible) decision making process, in particular determining the frequency of formal meetings as well as listing such measures which are subject to a resolution of all managing directors.

Authority and powers

Managing directors can represent and bind the company towards third parties in an unlimited way regardless of any internal restrictions (e.g. in the articles of association or rules of procedure such as consent provisos in favour of the shareholders' meeting or a supervisory board), unless there is a case of abuse of such power of representation (*Missbrauch der Vertretungsmacht*), meaning that a third party is aware of or, under specific circumstances, should have been aware of such misuse.

Delegation

The managing directors may delegate tasks to proxy holders, but retain overall responsibility for the company's operations and management.

Duties and obligations of directors

What are the key general duties of directors?

Organisational duties

- Duty to convene and prepare a Shareholders' Meeting in the following circumstances:
  - The annual ordinary shareholders' meeting
  - If a business decision falls within the competence of the shareholders' meeting due to specific provisions in the articles of association (so called approval catalogue)
  - Extraordinary shareholders' meeting, if this is necessary in the interest of the company, in particular if the annual (or any interim) balance sheet shows that one half or more of the share capital has been lost
- Disclosure Obligation, Shareholders' Directives
  - Obligation to provide each shareholder upon request with information about matters concerning the company and to allow them to inspect the books and documents of the company
  - Obligation to comply with shareholders' instructions based on valid shareholders' resolutions
- Responsibility for compliance with application and filing requirements towards the commercial register.

Duty of loyalty

The managing director has a duty of loyalty towards the company and a duty to exercise the diligence of a prudent business person (§ 43(1) GmbHG). This duty arises from the extensive competences of the managing director and their access to the share capital of the company. In particular, the managing director is obliged:

- Not to disclose any business secrets or other confidential information about the company
- Not to compete with the company
- To return any personal advantages deriving from executed agreements to the company

Other duties

- Preservation of the share capital
- Accounting duties
- Tax and social contributions
- Obligations during crisis/insolvency

Business Judgment Rule

A managing director does not breach the duty of care if, in making a business decision, the director reasonably believed to be acting on the basis of adequate information and in the best interest of the company (§ 93(1) sentence 2 AktG, applied by analogy to the GmbH). This safe harbour (known as the Business Judgment Rule) protects directors from liability for decisions that turn out to be unfavourable, provided the decision-making process was diligent and free from conflicts of interest. The managing director bears the burden of proof that these requirements were met.

What are directors' other key obligations?

See What are the key duties of directors?

Transactions with the company

There are no general restrictions except that any such transactions must be at arms' lengths in order to avoid any breach of capital maintenance rules or tax implications. However, a managing director cannot participate in any decision relating to their own discharge or which would give rise to a conflict of interest such as the release of such managing director from a liability.

Liabilities of directors

Breach of general duties

In general, managing directors owe their duties to the company itself. Therefore, in case if any breaches, only the company is entitled to bring an action for breach of duty against a managing director.

Different from other jurisdictions, under certain circumstances, (minority) shareholders may not bring derivative claims of the company against a managing director.

In general, third contractual parties may not personally sue a managing director for a breach of their duties. This is only possible in cases of the legal institute of "immorality" (*Sittenwidrigkeit*).

Liabilities on insolvency

In addition to the liabilities set out in Breach of general duties, the following applies:

- The managing director must prevent a financial crisis of the company by setting up an early warning system, by taking appropriate countermeasures and reporting to the supervisory bodies.
- If the annual (or any interim) balance sheet shows that half or more of the share capital has been lost, the managing directors must call a shareholders' meeting without any undue delay.
- In the event of insolvency, i.e. illiquidity or over-indebtedness, the managing director is obliged to file for insolvency. The application must be filed without undue delay, but no later than three weeks (in the case of illiquidity) or after six weeks (in the case of over-indebtedness) after the event of insolvency. Failure to do so may result in severe civil and criminal liability. (For example, if the managing director continues to make payments on behalf of the company after the company has become insolvent, such director shall be personally liable to the company for the loss incurred by the creditors, unless the payments are consistent with the diligence of a prudent and conscientious manager. The same applies to any payments made to the shareholders which lead to the insolvency of the company.)

Other key risks

In case of non-compliance with the filing of financial statements, the managing directors of a GmbH are subject to administrative fines.

Protection against liability

How can directors be protected from liability?

The company may conclude D&O insurance policies in favour of the directors. Such policies typically cover the personal liability of managing directors for financial losses caused by a breach of duty, but generally exclude intentional misconduct and criminal fines. It is common practice to include a deductible (*Selbstbehalt*) in the policy.

What practical steps can directors take to avoid liability?

The following steps can be recommended:

- Proper information about any internal restrictions imposed on the managing director in the company's articles of association, by shareholder resolutions or in the managing director's service agreement.

- Setting up a specific reporting system for social contribution payments, tax and proper accounting and preparation of financial statements.
- Thorough documentation of any business decision and contract entered into with third parties. For difficult business decisions, the managing director should seek prior shareholder approval.
- Establishment of an early financial crisis warning system.
- Where more than one managing director has been appointed, the shareholders' meeting should allocate specific fields of responsibility.
- The shareholders of a company regularly resolve upon the formal approval of the management (*Entlastung*) after the end of each business year. Such formal approval serves as a waiver of any claims which were identifiable at the time of the resolution.
- Also, the company may explicitly waive any claims, recognizable or not, against its managing director (*Generalbereinigung*).

  However, such waivers or underlying shareholders' resolutions do not exclude the managing directors liability if the infringed duties relate to capital maintenance rules, the interests of the company's creditors (most particularly, in an insolvency situation) or any other third party (e.g. tax authorities).

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